Supreme Court, U.S.
FILED

No. 94-1021 NOV 17 1994

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In The

Supreme Court of the United States

October Term, 1994

RONALD WHITE and JODI WHITE,

Petitioners,

vs.

WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, Iowa; RONALD FOSTER, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; DAVID NOEL, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; CITY OF DES MOINES, IOWA; JAMES RAMEY, individually and in his official capacity as an Assistant Polk County Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

I.

Whether a defendant who is acquitted is precluded from claiming damages based on a violation of his constitutional right to a fair trial.

II.

Whether a prosecutor is entitled to absolute prosecutorial immunity after he knowingly failed to produce exculpatory evidence in violation of a court order.

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The opinion of the United States District Court for the Southern District of Iowa is contained in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit ("Eighth Circuit") was entered on July 14, 1994. On August 19, 1994, the Eighth Circuit denied a Petition for Rehearing and Suggestion for En Banc Review. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Certiorari review is appropriate because the case involves important questions of law which have not been, but should be settled by this Court. The Eight Circuit's decision directly conflicts with an analogous decision by the Ninth Circuit on the same matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall property be taken for public use, without just compensation.

2. 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Ronald White, filed an action in the United States District Court for the Southern District of Iowa against Respondents Moulder, the City of Des Moines, Noel, Foster, Polk County and Ramey, alleging Moulder and the City of Des Moines violated his Fifth Amendment right to due process by terminating him. Petitioner additionally charged Polk County, Ramey, Foster and Noel with denying him a fair trial pursuant to 42 U.S.C. § 1983 by deliberately withholding exculpatory

evidence. Petitioner made State claims against all Respondents for intentional infliction of emotional distress.

Respondents filed Motions for Summary Judgment which were granted by Chief District Judge Charles R. Wolle.

The Court of Appeals affirmed: "after considering officer White's trial as a whole, we conclude Officer White has failed to show a constitutional violation because his trial was not fundamentally unfair," (App. p. A5), and "although the prosecutor's failure to respond to Officer White's Motion to Produce exculpatory evidence is inexcusable, this delay did not impair White's right to a fair trial." (App. p. A5).

FACTS RELEVANT TO REVIEW

On November 8, 1990, Petitioner Ronald White supervised the execution of a search warrant at the residence of a suspected drug dealer. Cash and lottery tickets were seized and photographed at the scene.

When the money and tickets were offered into evidence during the suspect's trial it was determined that a $100.00 bill and a winning lottery ticket were missing. On May 9, 1991, Petitioner White was charged with one (1) count of Theft in the Third Degree, in violation of Section 714.2(3) of the Code of Iowa, for allegedly stealing the missing bill and ticket. On June 25, 1994, prior to the commencement of his trial, Petitioner White filed a Motion to Produce. On August 29, 1991, Associate District Judge Patricia Houlihan ordered the prosecuting

attorney, Respondent Ramey, to produce any exculpatory evidence. Ramey failed to comply, instructing Respondent Foster to withhold field notes containing identifying information regarding the missing bill and ticket. The criminal trial against Petitioner Ronald White commenced September 9, 1991. During the trial, Respondent Ramey gave false sworn testimony regarding the serial numbers on a list of currency presented as evidence. The trial judge, Polk County District Judge Arthur E. Gamble, found that Ramey "knowingly, willfully, intentionally, and deliberately suppressed exculpatory evidence in direct violation of Judge Houlihan's Order." (App. p. A3). Petitioner White was acquitted on all charges on September 11, 1991.

REASONS FOR GRANTING THE WRIT

I. WHETHER A DEFENDANT WHO IS ACQUITTED IS PRECLUDED FROM CLAIMING DAMAGES BASED ON A VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The Eighth Circuit held Petitioner failed to show a constitutional violation as to his claim that he received a fundamentally unfair trial. (App. p. A5). The Court cites *Christman v. Hanrahan,* 500 F.2d 65 (7th Cir.), *cert. denied,* 419 U.S. 1050 (1974), to support its ruling that White did in fact receive a fundamentally fair trial. *Christman* held that an acquittal by a jury made the trial fundamentally fair. The court indicated it was not deciding generally the issue of whether a delayed disclosure may be sufficiently prejudicial to deprive an accused of a fair trial even if an

acquittal occurred. *Id.* at 68. The present case provides the exact scenario *Christman* contemplated in that Petitioner was forced to defend himself, here all of the way through a criminal trial, when Respondents knowingly concealed exculpatory evidence in direct violation of a Court order. The Defendant in *Christman* was relieved of the burden of having actually to defend himself at trial where, prior to trial, the charges against him were dismissed.

The Eighth Circuit incorrectly held Petitioner's complaint is essentially about the timing of the discovery of exculpatory evidence. The Court held that since Petitioner was acquitted, the trial court effectively prevented unfair jury influence by striking all the evidence concerning the seized currency and directing the jury to disregard the evidence. The very fact that Petitioner was required to defend himself at a trial seriously prejudiced him.[1]

The Eighth Circuit's decision directly conflicts with the holding in *Haupt v. Dillard,* 17 F.3d 285 (9th Cir. 1994). In *Haupt,* a criminal defendant was acquitted following a trial on murder and kidnapping charges. The Defendant then brought a § 1983 action alleging violation of his constitutional rights claiming he did not receive a fair trial. The United States District Court granted summary judgment holding that because Haupt was ultimately acquitted he received a fair trial. *Id.* at 287. On appeal, the Ninth Circuit held that Haupt's acquittal spoke only to

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[1] Petitioner was terminated from his job as a result of the execution of the search warrant that he supervised. He has suffered lost income and serious emotional trauma.

the amount of damages he suffered and that it was irrelevant to whether he had a cause of action. *Id.* Haupt held an acquittal does not erase all injury. *Id.* The facts in the instant case provide the exact situation contemplated by *Haupt.*

The Eighth Circuit's decision, if permitted to stand, creates an intolerable conflict between circuits. Prosecutors are permitted under the decision to ignore court orders to produce exculpatory evidence until trial, without penalty. The decision sets a precedent that is contrary to public policy and unconstitutional.

II. WHETHER A PROSECUTOR IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY AFTER HE KNOWINGLY FAILED TO PRODUCE EXCULPATORY EVIDENCE IN VIOLATION OF A COURT ORDER

The Court of Appeals concluded Respondent Ramey should be granted absolute prosecutorial immunity for his failure to produce exculpatory evidence to White, holding that his actions fell squarely within the parameters of protected prosecutorial functions set forth in *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). This holding is erroneous.

The Eighth Circuit failed to consider the Court's ruling in *Burns v. Reed,* ___ U.S. ___, 111 S.Ct. 1934, 114 L.ED.2d 547 (1991), holding that prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police. In the instant case, Respondent Ramey admitted he advised Respondent Officers Foster and Noel to keep their field notes to themselves and

chose not to produce this information to Petitioner or his counsel, even after a court order was issued.

The Court in *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), noted:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested. On the other hand, when a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

Id.

Respondent Ramey gave legal advice to the police officers involved and determined that certain evidence, field notes, should be left in their files. Additionally, he participated in the bill serialization itself, a function normally performed by a detective or police officer. *Burns* and *Buckley* prohibit prosecutors from giving legal advice and serving in an investigatory capacity. If any immunity is afforded Ramey, it can only be qualified immunity.

A recent Ninth Circuit case is particularly dispositive regarding the level of prosecutorial immunity to be granted when judicial deception is involved. In *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457 (9th Cir. 1994), the court denied immunity, after finding a knowingly false statement (or a statement made with reckless disregard for its truth) to the court includes a

subjective component and constitutes judicial deception. *Id.* at 462. In the present case, the state court, during Petitioner's criminal trial, held that Ramey "knowingly" withheld exculpatory evidence and as such, he should not be granted any immunity.

Mendocino cited extensively to *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (*Branch I*), when discussing judicial deception claims, stating:

> *Branch I* controls our analysis of this claim. The heightened pleading standard is applicable to a claim of judicial deception: (A) Plaintiff's complaint must contain non-conclusory allegations that the defendant knowingly included false statements in the affidavit or did so with reckless disregard. That is, he must (1) "point out specifically the portion of the warrant affidavit that is claimed to be false," and (2) allege some facts tending to show that the defendant was aware or should have been aware of the falsity of those statements. (3) He must also allege that the false statements were "necessary to the finding of probable cause," but without the particularity required of his allegations regarding the defendant's state of mind.

Id., at 463.[2]

The Eighth Circuit appears to contradict itself, holding on one hand that Ramey's actions were inexcusable, yet also finding that an Ethics Committee sanction is a

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[2] The allegations in *Mendocino* were that portions of a search warrant affidavit were false and that officials knew that information concerning a car bombing, which was used to justify the search, was false.

satisfactory remedy. Respondent Ramey's discipline is of little import to Petitioner after having been required to expend large sums of money for attorney fees and costs, being terminated from his employment and having to suffer through a three-year court battle accompanied by the subsequent emotional trauma. It is correct Ramey's actions were inexcusable, and those inexcusable actions effectively cost Petitioner a fair trial, and regardless of his acquittal, caused serious injury to Petitioner. Accordingly, absolute immunity should not be granted.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court grant his petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Appendix A. Ronald White; Jodi White v. William Moulder, et. al., The opinion of the Eighth Circuit Court of Appeals..... A1

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-1307SI

Ronald White; Jodi White,

Appellants,

v.

William Moulder, in his official capacity as Chief of Police of the City of Des Moines; Ronald Foster, individually and in his official capacity as Police Officer of the City of Des Moines, IA; David Noel, individually and in his official capacity as Police Officer of the City of Des Moines, IA; Polk County, IA; City of Des Moines, IA; James Ramey, individually and in his official capacity as an Assistant Polk County Attorney,

Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: October 13, 1993
Filed: July 14, 1994

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

FAGG, Circuit Judge.

Des Moines police officer Ronald White supervised a search in which police officers seized ten $100 bills and a winning $50 lottery ticket from suspects accused of drug charges. Police officers photographed the seized currency and lottery ticket at the scene of the search. When the prosecution offered the seized evidence at the suspects' state court trial, the lottery ticket was missing and the exhibit envelop contained nine $100 bills, a $50 bill, two $20 bills, and a $10 bill. Believing someone had tampered with the evidence, the trial judge asked Ronald Foster and David Noel, Des Moines police officers who had been present at the search, to count the currency and prepare an inventory by denomination and serial number. Because the trial judge allowed the suspects to plead guilty to lesser charges, the trial ended and the exhibit envelope containing the currency was returned to the police department along with the officers' inventory.

During an investigation into the missing evidence, a police identification technician found Foster and Noel's inventory mistakenly listed the $50 bill twice and neglected to list the smaller bills. An identification sergeant notified Foster, who put the information in his field notes and also told Noel and Polk County Attorney James Ramey about the mistakes. Ramey told Foster he did not need the information from Foster's field notes at that time. A police investigator also learned that Officer

White's spouse, Jodi White, cashed the missing lottery ticket the day after the search. About a month later, Ramey filed a state charge against Officer White for theft of the missing $100 bill and lottery ticket. The police department then dismissed Officer White from employment.

Before Officer White's trial on the theft charge, his attorney filed a motion to produce exculpatory evidence, but Ramey produced no evidence. At Officer White's trial, Ramey represented to the judge that the serial numbers on the currency in the exhibit envelope at the suspects' trial matched the serial numbers on the currency inventory prepared by Foster and Noel. After Ramey's representation proved untrue, Foster testified about telling Ramey of the mistakes in the inventory. Finding Ramey "knowingly, willfully, intentionally and deliberately suppressed exculpatory evidence," the trial judge struck the testimony about the currency seized in the search and instructed the jury to disregard all evidence about the currency. The jury acquitted Officer White. Officer White was later ordered reinstated on the policy force with back pay.

Officer White brought this action under 42 U.S.C. § 1983 against Des Moines Chief of Police William Moulder and the City of Des Moines, claiming his dismissal from the police force violated his right to due process. Officer White made additional § 1983 claims against Foster, Noel, Ramey, and Polk County, claiming violations of his right to a fair trial. Officer White and Jodi White also made state law claims against Moulder, the City of Des Moines, Foster, Noel, Ramey, and Polk County, for intentional infliction of emotional distress.

The district court granted summary judgment denying all the Whites' claims. The Whites appeal and we affirm.

Our review is limited to issues specifically raised and argued in the Whites' brief. *See United States v. Simmons*, 964 F.2d 763, 777 (8th Cir.), *cert. denied*, 113 S. Ct. 632 (1992). We thus do not address Officer White's claims against Moulder and the City of Des Moines, which the Whites did not brief. As for the issues raised in the Whites' brief, we may affirm the district court's grant of summary judgment on any ground supported by record. *See Cochenour v. Cochenour*, 888 F.2d 1244, 1246 (8th Cir. 1989).

On appeal, Officer White rests his § 1983 claims on his assertion that he was denied his constitutionally protected right to a fair trial when Foster, Noel, and Ramey failed to disclose the evidence of mistakes in the currency inventory to Officer White or his attorney before Officer White's state court trial started. Our review of Officer White's § 1983 claims necessarily begins with the threshold question of whether Officer White has been deprived of a constitutional right. *See Baker v. McCollan*, 443 U.S. 137, 140 (1979). After considering Officer White's trial as a whole, we conclude Officer White has failed to show a constitutional violation because his trial was not fundamentally unfair. *See Christman v. Hanrahan*, 500 F.2d 65, 67-68 (7th Cir.), *cert. denied*, 419 U.S. 1050 (1974). Because the mistakes in preparing the currency inventory were discovered during Officer White's trial, Officer White's complaint is essentially about the timing of discovery of evidence Officer White considers favorable to his defense. *See id.* at 68. The delayed disclosure did not prejudice Officer White's defense, however, because the

trial court effectively prevented unfair jury influence by striking all the evidence about the seized currency and directing the jury to disregard the evidence, and because Officer White was acquitted on theft of the $100 bill and the lottery ticket. Although the prosecutor's failure to respond to Officer White's motion to produce exculpatory evidence is inexcusable, the delay did not impair White's right to a fair trial.

Having concluded Officer White's failure to show a constitutional violation disposes of his § 1983 claims against Foster, Noel, Ramey, and Polk County, we turn to the Whites' other claims. The Whites contend Ramey and Polk County intentionally inflicted emotional distress on the Whites when Ramey failed to produce the evidence about the mistakes in the currency inventory after Officer White's motion to produce was granted. We need not consider the merits of the Whites' emotional distress claims against Ramey and Polk County because Ramey and Polk County are entitled to absolute prosecutorial immunity from civil liability under Iowa law. Iowa follows the *Imbler* functional approach to prosecutorial immunity, giving county attorneys and the counties that employ them absolute immunity for activities that are " 'intimately associated with the judicial phrase of the criminal process.' " *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); *see Hanson v. Flores*, 486 N.W.2d 294, 295 (Iowa 1992) (immunity extends to county). Ramey's failure to produce evidence favorable to Officer White falls squarely within the protected prosecutorial function. *See Imbler*, 424 U.S. at 416, 430 (prosecutor absolutely immune from allegation he suppressed material evidence).

Even though Ramey is immune from tort liability to the Whites, Ramey is "amenab[le] to professional discipline by an association of his peers." *See Imbler*, 424 U.S. at 429; *Blanton v. Barrick*, 258 N.W.2d 306, 311 (Iowa 1977) (to same effect). Indeed, the Iowa Supreme Court suspended Ramey's license to practice law based on Ramey's conduct at Officer White's trial. *Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Ramey*, 512 N.W.2d 569 (Iowa 1994).

The Whites also contend Foster and Noel intentionally inflicted emotional distress on the Whites by failing to disclose the evidence about the inventory mistakes directly to Officer White or his attorney. To prevail on these claims, the Whites must prove outrageous conduct. *See Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 183 (Iowa 1991). Because Foster and Noel satisfied their obligations to disclose exculpatory evidence when they told prosecutor Ramey about the mistakes in their inventory, *see Walker v. City of New York*, 974 F.2d 293, 299 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 1387, *and cert. denied*, 113 S. Ct. 1412 (1993), we agree with the district court that Foster and Noel's failure to disclose the evidence to White or his attorney cannot be considered outrageous. The district court thus properly granted summary judgment for Foster and Noel on the Whites' emotional distress claims. *See Cutler*, 473 N.W.2d at 183 (court decides as a matter of law whether conduct may reasonably be considered outrageous).

Finally, the Whites challenge the district court's denial of the Whites' motion to amend their complaint to allege a conspiracy between Foster, Noel, Ramey, and

Moulder to deny Officer White equal protection by withholding the evidence about the mistakes in the currency inventory. We conclude the district court did not abuse its discretion in denying the Whites' motion because the undisputed facts show the Whites do not have colorable grounds for relief on their conspiracy theory. *See Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994). It is undisputed Foster and Noel told Ramey of the mistakes and put the information in their field notes and that neither the police officers nor Ramey told Moulder about the mistakes. Additionally, the Whites were guilty of undue delay in filing their motion eleven months after their complaint was filed and after the district court granted summary judgment for two defendants. The district court was not persuaded to grant the Whites' tardy motion to amend their complaint because the case from another federal circuit on which the Whites relied for raising their conspiracy theory was decided ten months before the Whites filed their motion to amend. *See id.*

Accordingly, we affirm the district court.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 93-1307SIDM

Ronald White; Jodi White, Appellants, v. William Moulder, in his official capacity as Chief of Police of the City of Des Moines; Ronald Foster, Individually and in his official capacity as Police Officer of the City of Des Moines, IA; David Noel, Individually and in his official capacity as Police Officer of the City of Des Moines, IA; Polk County, IA; City of Des Moines, IA; James Ramey, Individually and in his official capacity as an Assistant Polk County Attorney, Appellees.	*	Appeal from the United States District Court for the Southern District of Iowa. 4-92-CV-80006

JUDGMENT
(Filed Sept. 2, 1994)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court.

July 14, 1994

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RONALD WHITE and JODI WHITE, Plaintiffs, vs. WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, RONALD FOSTER and DAVID NOEL, in their official capacities as Police Officers of the City of Des Moines and in their individual capacities, POLK COUNTY, the CITY OF DES MOINES, and JAMES RAMEY, in his official capacity as an Assistant Polk County Attorney and in his individual capacity, Defendants.	NO. 4-92-CV-80006 RULINGS (Filed Jan. 19, 1993)

Plaintiff Ronald White was tried and acquitted of criminal charges in Polk County District Court. He was terminated, but later reinstated, as a police officer for the city of Des Moines. He and his wife brought this action (filed January 8, 1992) seeking declaratory relief, injunctive relief, and compensatory damages to redress harms arising from his dismissal and prosecution.

In count 1 of the complaint, plaintiff Ronald White alleges that Polk County did not conduct a reasonable

background check prior to hiring James Ramey. In counts 2 and 3, plaintiff Ronald White alleges that the city of Des Moines and William Moulder terminated his employment without due process. In count 4, plaintiff Ronald White alleges that Ronald Foster and David Noel deliberately concealed exculpatory evidence and denied him a fair trial. In counts 5 and 6, invoking the court's supplemental jurisdiction, plaintiffs Ronald and Jodi White allege all defendants intentionally inflicted emotional distress upon them. In count 7, plaintiff Ronald White alleges that defendant James Ramey, an Assistant Polk County Attorney, gave police officers unreasonable legal advice, initiated and filed charges against White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during White's trial.

On July 21, 1992, this court granted summary judgment to defendants Polk County and James Ramey on counts 1, 7, and those parts of counts 5 and 6 that assert claims against them.

On October 20, 1992 the remaining defendants filed a motion for summary judgment. A hearing on the motion was held December 11, 1992.

On December 16, 1992, with the court's permission, plaintiffs' [sic] filed a supplemental brief in support of their resistance to defendants' motions for summary judgment. On that date plaintiffs also filed a motion to reconsider the earlier ruling for summary judgment in favor of defendants Polk County and James Ramey and a motion to amend their complaint to allege a conspiracy among all defendants to deprive plaintiff Ronald White of his constitutional right to equal protection. Defendants

Polk County and Ramey were not served with the plaintiffs' motions but have filed responses nonetheless. Defendants Moulder, Foster, Noel, and the city of Des Moines have also responded.

All pending motions are ready for ruling.

I. Motion for Summary Judgment: Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. Fed. R. Civ. P. 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The court reviews the summary judgment record in a light most favorable to the party resisting summary judgment. But once a movant has demonstrated that an asserted claim lacks factual and legal support, summary judgment will be appropriate unless the non-moving party demonstrates that admissible evidence and a viable legal theory generate an issue for trial. *City of Mount Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 271-72 (8th Cir. 1988).

A. Counts 2 and 3. Counts 2 and 3 of plaintiffs' complaint allege that defendants city of Des Moines and William Moulder denied Ronald White's right to continued employment without procedural due process. Defendants Des Moines and Moulder are entitled to judgment as a matter of law on these counts.

Property interests are not defined by the Constitution; they are created and defined by independent sources. *Board of Regents of State Colleges v. Roth*, 408 U.S. 565, 577 (1972). Plaintiffs rely on *Bennett v. City of Redfield*

for their allegation that public employees have a property interest in continued employment. *Id.*, 446 N.W.2d 467, 472 (Iowa 1989) ("The civil service law, Iowa Code chapter 400, which creates a property interest in continued employment * * * ."). But the Iowa Supreme Court has consistently held that a police officer does not have a constitutional right to continued employment. *See Klein v. Civil Serv. Comm'n of Cedar Rapids*, 260 Iowa 1147, 1156, 152 N.W.2d 195, 200 (1967); *Sieg v. Civ. Serv. Comm'n of West Des Moines*, 342 N.W.2d 824, 829 (Iowa 1983); *City of Clinton v. Loeffelholz*, 448 N.W.2d 308, 311 (Iowa 1989). Ronald White has no property interest in continued employment as a police officer and no legal basis for this ground of his constitutional claim.

Nor has Ronald White established that he was denied a liberty interest without due process.

> To establish a liberty interest due process claim, the claimant must prove that the employer published false, stigmatizing charges in connection with the discharge which were denied by the claimant and which seriously damaged the claimant's employment opportunities or standing and associations in the community, all without notice and opportunity to be heard in a name clearing hearing requested by the claimant.
>
> Therefore, if the claimant has been afforded notice and opportunity to be heard in a name clearing hearing, no liberty interest claim arises.

Bennett v. City of Redfield, 446 N.W.2d at 471.

The summary judgment record clearly establishes that Ronald White had a name-clearing hearing. This

afforded him his notice and opportunity to be heard. Indeed, the Iowa Civil Service Commission reinstated Ronald White as a police officer. Defendants Des Moines and Moulder did not deprive him of a liberty interest. Defendants are entitled to summary judgment in their favor on counts 2 and 3.

B. Count 4. In count 4, plaintiff Ronald White asserts that defendants Ronald Foster and David Noel denied him a fair trial in failing to directly notify him of exculpatory evidence. Plaintiff concedes that Foster and Noel immediately informed Assistant County Attorney Ramey of the evidentiary discrepancies, and he also concedes that White obtained the information during his criminal trial.

The court must determine "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. ___, 111 S. Ct. 1789, 1793 (1991). Defendants argue that plaintiff cannot claim he was denied a fair trial when that trial resulted in his acquittal. The Eighth Circuit has not addressed this particular issue. However, the Seventh Circuit decided a case strikingly similar to the case at bar. *Christman v. Hanrahan*, 500 F.2d 65, 69 (7th Cir. 1974) (Christman was tried on murder charge, police and prosecution deliberately suppressed evidence favorable to Christman, evidence was disclosed before trial was concluded, Christman was acquitted). The *Christman* court noted that "the controlling principle [in *Brady v. Maryland*, 373 U.S. 83 (1963),] is not punishment of society for the prosecutor's misdeed 'but avoidance of an unfair trial to the accused.' " *Christman*, 500 F.2d at 68. The *Christman* court held that "[t]he failure to allege any facts disclosing an impairment of plaintiff's

right to a fair trial * * * is fatal to plaintiff's section 1983 claim." *Id.* at 69. This court is persuaded by the *Christman* reasoning. *See also Schiavone Construction Co. v. Merola*, 678 F. Supp. 64, 66 (S.D.N.Y. 1988) (no denial of a fair trial where plaintiff was acquitted), *aff'd*, 848 F.2d 43 (1st Cir.), *cert. denied*, 488 U.S. 855 (1988); *Schertz v. Wapuca County*, 683 F.Supp. 1551, 1573 (E.D. Wis. 1988) (no denial of fair trial where plaintiff acquitted at both trials); *Jones v. City of Chicago*, 639 F. Supp. 146, 151 (N.D. Ill. 1986) (no denial of fair trial where mistrial and charges dropped).

Defendants Foster and Noel are entitled to summary judgment on the constitutional claim alleged in count 4.

Defendants are also entitled to summary judgment in their favor on their qualified immunity defense. The allegations in count 4 are based on an assumption that police officers have a duty to produce evidence directly to a criminal defendant or the defendant's attorney. Plaintiff has not produced, nor has the court located, any authority in support of such a duty on the part of police officers. Ronald White had no "clearly established right" to have police officers, rather than the prosecution, deliver exculpatory evidence to him. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Therefore, defendants Ronald Foster and David Noel are immune from liability on count 4.

C. Counts 5 and 6. Plaintiff Ronald White has alleged in count 5, and plaintiff Jodi White has alleged in count 6, that the defendants are liable to each of them for intentional infliction of emotional distress. Defendants Moulder, Foster, Noel, and the city of Des Moines move for summary judgment on this claim; plaintiffs urge the

court to exercise its supplemental jurisdiction to hear this claim and resist the motion for summary judgment.

To succeed on an intentional infliction of emotional distress claim, the plaintiffs must prove that (1) the defendants' conduct was outrageous; (2) the defendants intentionally caused, or had reckless disregard for the probability of causing, emotional distress; (3) the plaintiffs suffered severe or extreme emotional distress; and (4) the defendants' outrageous conduct actually and proximately caused plaintiffs' emotional distress. *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984).

The summary judgment record before the court, viewed in a light most favorable to the plaintiffs, fails to establish liability on these claims of outrageous conduct. The conduct was the firing of Ronald White by Moulder and the City, as well as the belated delivery to White of favorable evidence by Foster and Noel. This conduct was not "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (quoting *Restatement (Second) of Torts* section 46, comment d (1965)).

Defendants Moulder, Foster, Noel, and city of Des Moines are entitled to summary judgment on counts 5 and 6.

II. Motion to Reconsider/Motion to Amend: Plaintiffs ask this court to reconsider its earlier ruling for summary judgment and their motion to amend their complaint in light of the United State Supreme Court's

November 1992 denial of certioriri [sic] in the case of *Buckey v. County of Los Angeles*, 957 F.2d 652, *as amended*, 968 F.2d 791 (9th Cir. 1992), *cert. denied sub nom, City of Manhattan Beach v. Buckey*, No. 92-560, 61 U.S.L.W. 3287 and *Children's Institute Internat'l v. Buckey (Peggy McMartin)*, No. 92-628, 61 U.S.L.W. 3314 (U.S. Nov. 30, 1992). In *Buckey v. County of Los Angeles*, the plaintiff Buckey sued several defendants after she was acquitted in a highly publicized child molestation case. She contended that "but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution." *Buckey*, 968 F.2d at 791. The district court dismissed Buckey's complaint for failure to state a claim, denied leave to amend the complaint, and dismissed the pendent state law claims without prejudice. The Court of Appeals for the Ninth Circuit reversed and remanded to the district court to allow Buckey to amend her pleadings:

> We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.
>
> This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." [citation omitted] * * * .
>
> Under the putative claim, Buckey, * * * , would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. * * * [T]he

> claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws * * * .

Id. at 794-95.

By their motion to amend, plaintiffs seek to allege the type of claim enunciated by the Ninth Circuit in *Buckey*.

A. Prior Ruling. Nothing offered by the plaintiffs in their supplemental brief or their motion to amend affects the court's analysis of plaintiffs' allegations contained in counts 1, 5, 6, and 7. The proffered amendment stands by itself and, though not so titled, would add a count 8. Consequently, the court reaffirms its earlier rulings of summary judgment in favor of defendants Polk County and James Ramey on counts 1, 5, 6, and 7.

B. Motion to Amend. Eleven months after the filing of plaintiffs' complaint, plaintiffs seek to amend their complaint to add another theory of liability. In support of their motion to amend, plaintiffs' claim that "[i]t was not apparent at the time the Original Petition was filed that this claim would need to be asserted against Defendants to obtain the relief requested." Motion For Leave to Amend, paragraph 2. In their proposed amendment, plaintiffs contend defendants Moulder, Foster, Noel – all in their official capacities, James Ramey in his individual capacity, and defendant Polk County conspired to deny plaintiff Ronald White equal protection by "requiring Plaintiff to defend himself on criminal theft charges, knowing that exculpatory evidence was wrongfully being

withheld from the trial court, Plaintiff's counsel, and Plaintiff." Amendment, paragraph 5.

A party's motion to amend its pleadings is governed by Federal Rule of Civil Procedure 15(a), which states that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). But "[t]he policy favoring liberal allowance of amendment does not mean that the right to amend is absolute." *Thompson-El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989).

> Leave to amend can be properly denied for several reasons, such as undue delay, bad faith or dilatory motive by the movant, undue prejudice to the opposing party, and futility of amendment.

Perkins v. Spivey, 911 F.2d 22, 34 (8th Cir.1990) (citations omitted).

Justice does not require that plaintiffs be allowed to amend their complaint. To allow the amendment of the complaint would be futile. Plaintiffs' proposed amendment alleges the existence of an agreement to withhold exculpatory evidence, i.e. a conspiracy, between defendants Moulder, Foster, Noel, Ramey, and Polk County. But the summary judgment record establishes that Foster and Noel immediately informed Ramey of the evidentiary discrepancies and Moulder was not informed of the discrepancies. There is absolutely no evidence that the defendants had a "mutual understanding" or a "meeting of the minds" concerning the evidentiary discrepancies. *See Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983).

The proposed amendment is offered 11 months after the filing of the complaint and after two defendants have

been granted summary judgment and the remaining defendants have moved for summary judgment. Plaintiffs' explanation for this delayed amendment – that "it was not apparent" they needed to allege conspiracy when they filed this action in January 1992 – does not persuasively counter the undue delay. Moreover, plaintiffs seek amendment in light of the United State [sic] Supreme Court's November 1992 denial of certiori [sic] in the *Buckey* case. The *Buckey* case was decided by the Court of Appeals for the Ninth Circuit in February 1992 and was available as non-binding authority one month after the complaint was filed. The United States Supreme Court's denial of certiori [sic] may add some weight to its citation in this circuit. Nonetheless, the theory recognized in the *Buckey* case is not tenable of the facts pleaded by plaintiffs.

The motion to amend plaintiffs' complaint is denied.

Conclusion: Defendants' motion for summary judgment on all remaining counts is granted. Plaintiffs' motion to reconsider is denied. Plaintiffs' motion to amend their complaint is denied.

The clerk of court shall enter judgment in favor of defendants and against plaintiffs, with costs taxed to the plaintiffs.

IT IS SO ORDERED.

Dated this 16th day of January, 1993.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-1307SIDM

Ronald White, et al.,	*	
	*	Order Denying
Appellants.	*	Petition for
	*	Rehearing and
vs.	*	Suggestion for
	*	Rehearing
Williama Moulder, et al.,	*	En Banc
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 19, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

No. 94-1021

FILED
DEC 8 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

RONALD WHITE and JODI WHITE,

Petitioners,

v.

WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, Iowa; RONALD FOSTER, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; DAVID NOEL, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; CITY OF DES MOINES, IOWA; JAMES RAMEY, individually and in his official capacity as an Assistant Polk County Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER A DEFENDANT WHO IS ACQUITTED IS PRECLUDED FROM CLAIMING DAMAGES BASED ON THE THEORY THAT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL HAS BEEN VIOLATED.

II. WHETHER A PROSECUTOR IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY AFTER HE KNOWINGLY FAILED TO PRODUCE EXCULPATORY EVIDENCE IN VIOLATION OF A COURT ORDER.

PARTIES TO THE PROCEEDINGS

Ronald White, is a police sergeant with the City of Des Moines, Iowa, who was terminated from employment on May 31, 1991, after a hearing on charges of criminal misconduct. White was charged with stealing items of evidence from a drug investigation scene. The items included cash and a winning lottery ticket. White has since been reinstated as a sergeant for the City of Des Moines Police Department. Prior to his dismissal he was in charge of the narcotics squad officers' team.

Jodi White, is the wife of Ronald White. She was found to have signed and cashed the missing lottery ticket a day after it was wrongly removed from the drug investigation scene.

William Moulder, is the Chief of Police for the City of Des Moines, Iowa.

Ronald Foster is a police officer for the City of Des Moines, Iowa. **David Noel** is a sergeant with the City's Police Department. The officers were both summoned to take possession of and to log money confiscated at the drug investigation scene. The officers noticed that they had mistakenly failed to record two bills, documented their mistake and immediately reported the mistake to the proper authorities. The officers do not function as prosecutors.

PARTIES TO THE PROCEEDING – Continued

City of Des Moines is a municipal corporation in the State of Iowa.

James Ramey is an Assistant Polk County Attorney for the State of Iowa. His duties include executing prosecutorial functions.

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OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued an order denying White's Petition for rehearing and rehearing en banc. This order is unreported and is included in the Petitioner's Appendix. The Eighth Circuit Court of Appeals' decision affirming the District Court's finding in favor of the Defendants is dated September 2, 1994 and is included in the Petitioner's Appendix. This opinion is cited at 30 F.3d 80 (8th Cir. 1994). The United States District Court for the Southern District of Iowa granted summary judgment to Defendants, Foster and Noel, on the plaintiff's constitutional claim. This decision is dated January 19, 1993 and is included in the Petitioner's Appendix. Further, on July 21, 1992, Defendant, Assistant Polk County Attorney James Ramey was granted summary judgment by the United States District Court for the Southern District of Iowa.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 14, 1994. On August 19, 1994, the Eighth Circuit denied the Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc. The Plaintiff seeks certiorari review by this Court and claims jurisdiction pursuant to 28 U.S.C. § 1254(1). Certiorari review is inappropriate because the case does not involve an important question of law which should be settled by this Court. The Eighth Circuit's decision is based on well

established law and does not present a problematic conflict among the circuits.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Facts Pertinent to the Petition

The Plaintiff omits relevant facts necessary for review of his Petition for Certiorari. The omitted facts are undisputed and stated below.

On November 8, 1990 Petitioner Ronald White supervised the narcotic squad officers who conducted a search of the residence of a drug dealer. During the search, both cash and narcotics were seized. Photographs were taken of the evidence and later found to be critical in a criminal charge brought against the Petitioner.

Upon close review of the photographs, it was found that a winning lottery ticket ($50.00) and a $100 bill had been photographed at the scene but had not been listed on the evidence log nor placed in evidence at trial.

An investigation uncovered the fact that Jodi White, the wife of Petitioner, Ronald White, signed the missing lottery ticket and cashed it on November 9, 1990, the day after it was wrongly removed from the scene.

Trial judge Bergeson ordered the cash in evidence be counted and a log of the serial numbers be made. Sergeant Noel and Officer Foster were summoned to Judge Bergeson's chambers to take possession of the trial exhibit containing $1,000 cash. While preparing the list of serial numbers requested, Sergeant Noel and Officer Foster mistakenly listed the serial number of one $50 bill twice and failed to list the serial numbers of two twenty dollar bills and one ten dollar bill. This mistake was discovered the same day by the Police Identification staff.

Sergeant Noel and Officer Foster were notified immediately of the mistake and promptly brought the mistake to the attention of the proper authorities. The officers informed Assistant County Attorneys Steve Foritano and James Ramey as well as Judge Bergeson and his court attendant, Judy Proske, of the mistake. The officers also documented the mistake in a field note. The Polk County Attorney's Office did not provide copies of the field note or photographs to the Petitioner's counsel during the discovery phase of the Petitioner's criminal trial.

Subsequently, Petitioner Ronald White was acquitted of the criminal charges brought against him.

While City of Des Moines Police Chief William Moulder and the City of Des Moines are named in the petitioner's appeal and petition for writ of certiorari, White has not stated claims against them. The United States Court of Appeals for the Eighth Circuit stated that because issues as to Defendants, Moulder and the City of Des Moines were not specifically raised in White's brief, they would not be addressed. (Petitioner's Brief A.4).

2. Inaccurate Statements in the Petition

The Petitioner's statement of facts relevant for review and his stated reasons for this Court to grant certiorari contain inaccurate statements of fact and law and are misleading in several respects.

As noted previously, the Petitioner omits pertinent facts that are necessary for review of his Petition for Writ of Certiorari. First, the Petitioner fails to note that a police investigation and his wife's own testimony established that his wife (Jodi White) cashed a winning lottery ticket wrongfully removed from the drug investigation scene and involved in this case.

Second, the Petitioner chooses to omit the fact that Officers Noel and Foster promptly notified the presiding judge and the Polk County Attorney's Office regarding arguably exculpatory evidence that was in their possession.

Third, the Petitioner misstates the law on exculpatory evidence and provides misleading reasons for this Court to grant certiorari. The Petitioner makes the assertion that he was denied a fair trial because Officers Noel and

Foster did not turn over arguably exculpatory evidence to his counsel. In making this assertion the Petitioner misleads the court by placing the police officers in prosecutorial roles. The Petitioner does not address well established law that prosecutors, not police officers, have a duty to disclose exculpatory evidence to opposing counsel.

REASONS FOR DENYING THE PETITION

I. A DEFENDANT WHO IS ACQUITTED IS PRECLUDED FROM CLAIMING DAMAGES BASED ON THE THEORY THAT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL HAS BEEN VIOLATED.

The issue raised in the Petition regarding the fairness of White's trial does not raise an important constitutional question to justify consideration by this Court. The record reveals that the Plaintiff has already made use of all avenues appropriate for review of his § 1983 constitutional claim.

The District Court and U.S. Court of Appeals for the Eighth Circuit reviewed White's constitutional claim and properly found that White had not established that a § 1983 claim exists.

The Petitioner argues that under *Haupt v. Dillard,* his acquittal does not preclude a finding that his right to a fair trial has been violated. 17 F.3d 285 (9th Cir. 1994). However, the clear weight of authority is with *Christman v. Hanrahan* and its progeny which holds to the contrary. 500 F.2d 65 (7th Cir. 1974).

The question presented in *Christman* is quite similar to those presented by the present situation. In *Christman*, the plaintiff brought a constitutional claim against a prosecutor and a policeman for an alleged violation of his constitutional rights. The plaintiff argued that his right to a fair trial was impaired because arguably exculpatory evidence was not brought to his attention before trial. The plaintiff was acquitted by a jury after only ten minutes of deliberation. The court held in the *Christman* case that because the plaintiff was acquitted, his trial was not fundamentally unfair and thus did not warrant a cause of action under § 1983. *Christman v. Hanrahan*, 500 F.2d 65, 67-68 (1974). This finding has been followed in subsequent cases. *United States v. Marrero*, 516 F.2d 12, 15 (7th Cir. 1975); *Schiavone Construction Co. v. Merola*, 678 F.Supp. 64, 66-67 (S.D. N.Y. 1988); *Jones v. City of Chicago*, 639 F.Supp. 146, 151 (N.D. Ill. 1986). Thus contrary to the Petitioner's assertion, the Eighth Circuit's decision to follow the holding in *Christman* does not create an intolerable conflict between circuits. (Petitioner's Petition p. 6). The clear weight of the authority is with *Christman*.

Even if this court finds the *Haupt v. Dillard* case persuasive, another reason remains for refusing to grant White's Petition for writ of certiorari. White's Petition should be denied because Officers Foster and Noel satisfied their constitutional duty to turn over arguably exculpatory information when they immediately disclosed the information to Assistant Polk County Attorney, James Ramey. The officers did not have a constitutional duty to disclose the information to the Petitioner as well. *Walker v. City of New York*, 974 F.2d 293, 299 (2d. 1992). See also *Campbell v. Maine*, 632 F.Supp. 111, 121 (D.Me. 1985), *aff'd*,

787 F.2d 776 (1st Cir. 1986). When faced with the question of whether a police officer has a duty to disclose arguably exculpatory evidence to the defense, the court in *Walker v. New York* held that they do not. The court noted that "a rule requiring the police to make separate, often, difficult and perhaps conflicting disclosure decisions would create unnecessary confusion." *Id.* The court further noted that where the police have shared all exculpatory evidence with the prosecutors, the claimant has failed to state a constitutional claim against the police for suppression of exculpatory evidence. 974 F.2d 293, 299.

Based upon this principle, the Petitioner's constitutional claim against the police must once again fail. Because Officers Foster and Noel were not under a constitutional duty to disclose exculpatory evidence to the Petitioner, the lower court properly decided that White does not have a cause of action under 42 U.S.C. § 1983. Under *Baker v. McCollan*, the plaintiff has not satisfied the first inquiry of a § 1983 suit; that he has been deprived of his constitutional right to a fair trial. 443 U.S. 137, 140 (1979).

Thus, even if this Court finds *Haupt v. Dillard* persuasive, White's Petition for writ of certiorari should still be denied. Officers Noel and Foster were not bound to disclose exculpatory evidence to White's counsel and therefore could not have violated the Petitioner's right to a fair trial.

II. IS PROSECUTOR ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY AFTER FAILING TO PRODUCE EXCULPATORY EVIDENCE IN VIOLATION OF A COURT ORDER.

Question two will not be addressed in this Brief in Opposition as it only relates to Assistant Polk County Attorney, James Ramey. Respondents Noel and Foster are not prosecutors and therefore need not address this question.

CONCLUSION

Based on the above stated facts, law and reasoning, the Respondents respectfully request that this Court deny the Plaintiff's Petition for Writ of Certiorari, and assess the costs to the Plaintiff.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

RONALD WHITE and JODI WHITE,

Petitioners,

vs.

WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, Iowa; RONALD FOSTER, individually and in his official capacity as Police Officer of the City of Des Moines, Iowa; CITY OF DES MOINES, IOWA; JAMES RAMEY, individually and in his official capacity as an Assistant Polk County Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JAMES RAMEY AND POLK COUNTY, IOWA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

LIST OF PARTIES

Polk County was a party at the district court level and on appeal to the Eighth Circuit (*See* Petition for Writ, pps. A1, A8). Polk County is not named as a party in the caption in the petition for writ of certiorari. It is assumed for purposes of this brief in opposition that Polk County is a party and the failure to include it as such was an unintentional omission on the part of the petitioners. Assistant Polk County Attorney James Ramey was named as a party in the petition for writ of certiorari.

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Appendix A. Opinion of U. S. District Court on Cross Motions For Summary Judgment Filed By Plaintiffs Ronald and Jodi White and Defendants Polk County and James Ramey A1

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The petition for writ of certiorari includes a district court ruling on a summary judgment motion made by the defendants City of Des Moines and those other defendants employed by the Des Moines Police Department. The petition for writ of certiorari does not include the district court ruling upon cross motions for summary judgment made by Mr. and Mrs. White and defendants Polk County and James Ramey. That ruling is included in this brief in opposition as Appendix A.

The opinion of the Eighth Circuit Court of Appeals regarding this case is *White v. Moulder*, 30 F.3d 80 (8th Cir. 1994).

STATEMENT OF THE CASE

The facts in this case are undisputed, as established in cross motions for summary judgment. *See* App. A, attached hereto. On November 8, 1990, police officers for the City of Des Moines, including petitioner Ronald White, searched a residence. (App. A, p. A2). They seized cash and a lottery ticket, and photographed this evidence. *Id.* The following day, petitioner Jodi White, wife of Officer White, cashed the lottery ticket seized in the search. (App. A, p. A2).

In April, 1991, police officer Foster discovered that a list of serial numbers of the bills seized in the earlier search did not exactly match the bills held by the city police department. Officer Foster advised Assistant Polk County Attorney Ramey of the discrepancy at that time.

Ramey advised Foster to keep his field notes of the discrepancy, but Ramey did not obtain a copy of the field notes. (App. A, p. A2).

On May 9, 1991, officer White was charged with one count of theft, based upon a one hundred dollar bill which was missing from the seized moneys and the lottery ticket which had been cashed by Jodi White. On August 29, 1991, a district associate judge ordered the prosecution to produce exculpatory evidence. (Petition, pp. 3-4).

In September, 1991, Officer White was tried for theft in the third degree. Prosecutor Ramey did not disclose the serial number mismatch prior to trial. When the mismatch was learned of at trial, the court excluded the money from evidence and instructed the jury to disregard all testimony about the seized cash. (App. A, p. A3). The State later moved for a mistrial, which White resisted. He was thereafter tried for theft on the evidence of the missing lottery ticket. White was acquitted of the charge. (App. A, p. A3).

Petitioners made a number of significant misstatements or omissions of fact in their petition.

Petitioners say, "On August 29, 1991, Associate District Judge Patricia Houlihan ordered the prosecuting attorney, respondent Ramey, to produce any exculpatory evidence. Ramey failed to comply, instructing respondent Foster to withhold field notes containing identifying information regarding the missing bill and ticket." (Petition, pp. 4-5). The undisputed facts as found by the district court show that this quotation contains no less than four misstatements. First, the conversation between

Ramey and Foster concerning the field notes occurred on or about April 26, 1991, fully four months before Judge Houlihan's order, not after it. (App. A, p. A2). Second, Ramey did not instruct Foster to "withhold" the field notes, but rather to preserve them and keep them. (App. A, p. A7). Third, the field notes did not contain any "identifying information" about the missing bill or the lottery ticket. Rather, the field notes made note of the discrepancy between the bills and the serialized list of the bills prepared by Foster and Noel. Nothing about the missing one hundred dollar bill was contained in the field notes. (App. A, p. A2). Fourth, and finally the field notes contained only information concerning the bills and contained no information concerning the missing lottery ticket. (App. A, p. A2).

Petitioners say, "Respondent Ramey gave legal advice to the police officers involved and determined that certain evidence, field notes, should be left in their files." (Petition, p. 7). In reality, the district court found that, " . . . Ramey's statement was not 'advice' at all." (App. A, p. A7).

Petitioners continue, "Additionally, he [Ramey] participated in the bill serialization itself, a function normally performed by a detective or police officer." (Petition, p. 7). This is absolutely false. Ramey did not participate in the serialization. Police officers Foster and Noel did participate in the serialization. (App. A, p. A2).

Petitioners imply that the failure to disclose exculpatory evidence about the bills caused Ronald White to be put to the rigors of trial, and that, "the very fact that that

petitioner was required to defend himself at a trial seriously prejudiced him." (Petition, p. 5). What petitioners fail to state is that regardless of the effect of the exculpatory evidence upon the charge of stealing the one hundred dollar bill, the charge against Ronald White also was based on theft of a fifty dollar lottery ticket. (App. A, p. A2). Petitioners fail to mention that Jodi White cashed the missing lottery ticket one day after her husband led the search in which the ticket was seized. (App. A, p. A2). Thus, Ronald White would have stood trial in any event upon the theft charge.

Petitioners also neglect to tell the Court that after the discrepancy between the serialized list and the bills became known, the bills and the list were excluded from evidence at Mr. White's trial and the jury was instructed to disregard all testimony about the bills. (App. A, p. A3). Finally, petitioners do not mention that Ronald White had it in his power to effect a remedy for all the unfairness he claims to have suffered at trial. The State made a motion for a mistrial and Ronald White resisted the same. (App. A, p. A3).

REASONS FOR NOT GRANTING THE WRIT

I. WHETHER THE COURT OF APPEALS ERRED IN RULING, BASED ON THE TOTALITY OF THE CIRCUMSTANCES, THAT PETITIONER WHITE RECEIVED A FAIR TRIAL.

Petitioners claim that the court of appeals held that Mr. White received a fair trial, and that this determination was based solely on his acquittal. Petitioners then

claim that the decision of the Eighth Circuit Court of Appeals in this case is in direct conflict with *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994). Petitioners' characterization of the court of appeals' decision is inaccurate. In addition, there is no conflict between the decisions of the Eighth Circuit Court of Appeals and the Ninth Circuit Court of Appeals.

The Eighth Circuit in this case held that Mr. White's trial was not fundamentally unfair. (Petition, pp. A4-A5). The Court of Appeals looked at the totality of circumstances surrounding the trial, including that the mistakes in inventory were disclosed during trial, that the trial court prevented unfair jury influence by striking all evidence about seized money and directing the jury to disregard the evidence, and that Mr. White was acquitted. (Petition, pp. A4-A5). The court did not, as petitioners claim, rule that White received a fair trial solely based on his acquittal.

The Ninth Circuit decision in *Haupt v. Dillard* is in harmony with the Eighth Circuit decision in this case. In *Haupt*, the Ninth Circuit considered whether, as a matter of law, an acquittal defeats a defendant's claim for denial of the right to a fair trial. *Haupt v. Dillard*, 17 F.3d at 287, 288. The Ninth Circuit held that an acquittal does not automatically erase all injury. The Eighth Circuit's decision in this case did not hold that an acquittal, as a matter of law, precludes a cause of action for denial of due process. Rather, the Eighth Circuit examined the totality of circumstances surrounding White's trial, and concluded that he received a fair trial. Therefore there is no conflict between the decisions of the Ninth Circuit in *Haupt* and the Eighth Circuit in this case.

In addition, the Eighth Circuit in its ruling relied on *Christman v. Hanrahan*, 500 F.2d 65 (7th Cir. 1974), *cert. denied*, 419 U.S. 1050 (1974). *Christman* recognized that an acquittal in and of itself does not guarantee that a defendant received a fair trial. *Christman v. Hanrahan*, 500 F.2d at 68 n.2. The fact that the Eighth Circuit relied on *Christman* demonstrates that the Eighth Circuit did not consider that an acquittal automatically guarantees a fair trial. Both *Haupt* and the decision in this case are in perfect harmony, and are logical extensions of the Seventh Circuit decision in *Christman*.[1]

There is no conflict of law between circuits. The court of appeals correctly ruled that petitioner in this case received a fair trial, based on the totality of the circumstances. The petition for writ of certiorari should be denied.

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[1] Petitioners mischaracterize the facts in *Christman*. They assert that "The defendant in *Christman* was relieved of the burden of having actually to defend himself at trial where, prior to trial, the charges against him were dismissed." (Petition, p. 5). In actuality the defendant in *Christman*, like Mr. White here, was tried on criminal charges, and had exculpatory evidence come to light during his trial. He was acquitted by a jury. The Seventh Circuit, in reviewing the entirety of the circumstances, held that *Christman* received a fair trial. *Christman v. Hanrahan*, 500 F.2d at 68.

II. WHETHER THIS COURT SHOULD REVIEW A DETERMINATION OF PROSECUTORIAL IMMUNITY UNDER STATE LAW, WHERE THE ACTIONS WERE TRIAL PREPARATION AND TRIAL ITSELF.

The Supreme Court will not ordinarily grant certiorari to review questions of state law. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); 17 Wright, Miller and Cooper, Federal Practice & Procedure § 4036, p. 41 (1988). The prosecutorial immunity defense was raised in response to a pendant state law claim for intentional infliction of emotional distress. (Petition, p. A 5-6). The court of appeals was deciding whether the prosecutor was immune under Iowa law. (Petition, p. A 5-6). This Court should refuse to review that determination.

In any event, Mr. Ramey is clearly entitled to the absolute prosecutorial immunity conferred upon him by the trial court and the Eighth Circuit. The actions he took – inexcusable or not — were taken in the context of trial preparation and trial itself. In this respect, he falls squarely under the umbrella of immunity created by this court in *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976).

Mr. Ramey did not give advice about hypnotizing a suspect prior to police questioning, as did the prosecutor in *Burns v. Reed*, 500 U.S. 478 (1991). Likewise, Mr. Ramey did not perform investigative functions normally undertaken by a police officer as did the prosecutor in *Buckley v. Fitzsimmons*. ___ U.S. ___, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). All Mr. Ramey did, as part of his trial preparation, was receive an evidentiary briefing from an investigating officer and ask the officer to make a note of the

evidence to keep in the officer's files. Therefore, Mr. Ramey is entitled to absolute prosecutorial immunity.

Petitioners' reliance upon *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457 (9th Cir. 1994) is entirely misplaced in the context of a discussion of prosecutorial immunity. Neither the facts of *Mendocino* nor its law have anything at all to do with petitioners' case. *Mendocino* concerns the appealability of a denial of a qualified immunity defense raised by law enforcement officers in a motion to dismiss. It also is concerned with the heightened pleading standard imposed upon the plaintiff in such a situation. Neither of these issues were before either the District Court or the Eighth Circuit in petitioners' case.

CONCLUSION

Because no inter-circuit conflict exists, because Mr. Ramey's entitlement to prosecutorial immunity is a state law question, and because Mr. Ramey was entitled to prosecutorial immunity in any event, respondents respectfully request the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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*Application For Admission To Supreme Court Pending

APPENDIX

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Appendix A. Opinion of the U.S. District Court, 7/21/92, upon cross motions for summary judgment by petitioners and respondents Polk County and James Ramey..... A1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RONALD WHITE and JODI WHITE, Plaintiffs, vs. WILLIAM MOULDER, in his official capacity as Chief of Police of the City of Des Moines, RONALD FOSTER and DAVID NOEL, in their official capacities as Police Officers of the City of Des Moines and in their individual capacities, POLK COUNTY, and CITY OF DES MOINES, Defendants.	*	NO. 4-92-CV-80006 ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT POLK COUNTY'S AND DEFENDANT JAMES RAMEY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Ronald White was tried and acquitted of criminal charges in Polk County District Court. In addition, he was terminated from his employment as a police officer for the city of Des Moines. He and his wife now seek declaratory relief, injunctive relief, and compensatory damages to redress harms arising from his dismissal and prosecution.

Before the court are the plaintiffs' resisted motion for partial summary judgment and the resisted motion for summary judgment of defendants Polk County and James Ramey. On May 14, 1992, counsel presented arguments to the court on these motions. The court concludes that

these defendants are entitled to summary judgment in their favor and against both plaintiffs. The motions for summary judgment of Polk County and James Ramey are granted; the motions for partial summary judgment of Ronald White and Jodi White are denied.

I. Background.

The facts pertinent to these motions are not in dispute. On November 8, 1990, Des Moines police officers, including Ronald White, searched the residence of Ernest Draper and Marilyn Wilson. The officers discovered cash and a lottery ticket and took photographs of what they found. The following day, the lottery ticket, signed by Jodi White, was cashed.

On January 2, 1991, Polk County Attorney John Sarcone hired James Ramey as an Assistant Polk County Attorney. Sarcone knew when he hired Ramey that Ramey had been disciplined by the Iowa Supreme Court for having failed to pay income tax.

On April 26, 1991, law enforcement officials who executed the search warrant listed serial numbers of the bills that had been seized from the Draper/Wilson residence and entered into evidence in the Draper/Wilson trial. Officers Ronald Foster and David Noel discovered that the listed serial numbers did not correspond with the bills held by the Des Moines Police Department. They promptly advised Ramey of the discrepancy.

On May 9, 1991, Ramey filed charges against Ronald White. On May 31, 1991, White was terminated from his job as a police officer for the City of Des Moines.

From September 3-12, 1991, Ramey tried White for theft in the third degree. But Ramey did not disclose the serial number mismatch prior to trial. When White learned at trial of the mismatch, he moved for mistrial. The court denied the motion but excluded the money from evidence and instructed the jury to disregard all testimony about the seized cash. The judge presiding at the trial in Polk County District Court found "that the State knowingly, willfully, intentionally, and deliberately suppressed exculpatory evidence." Plaintiff's Exh. 2. The State later moved for mistrial; White resisted the motion and it was denied. The jury found him not guilty. The State did not bring criminal charges against Jodi White.

In count 1 of this action, plaintiff Ronald White alleges that Polk County did not conduct a reasonable background check prior to hiring Ramey. In count 7, plaintiff Ronald White alleges that defendant James Ramey, an Assistant Polk County Attorney, gave police officers unreasonable legal advice, initiated and filed charges against plaintiff Ronald White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during White's trial. In counts 5 and 6, plaintiffs Ronald White and Jodi White allege that Ramey and Polk County intentionally inflicted emotional distress upon them. Plaintiff Ronald White also has asserted claims against the City of Des Moines, Police Chief William Moulder, and Des Moines police officers Ronald Foster and David Noel, but those claims are not addressed by either of the pending motions for summary judgment.

II. Applicable Law.

Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The court reviews the summary judgment record in a light most favorable to the party resisting summary judgment. But once a defendant has demonstrated that an asserted claim lacks factual and legal support, summary judgment will be appropriate unless the plaintiff demonstrates that admissible evidence and a viable legal theory generate an issue for trial.

III. Discussion.

Counts 1, 5, 6 and 7 of the complaint are before the court. Ronald White seeks damages in counts 1, 5, and 7; Jodi White seeks damages only in count 6. "Plaintiff" shall refer to plaintiff Ronald White unless otherwise noted.

A. Section 1983 Claim Against Polk County.

Plaintiff Ronald White alleges in Count 1 that Polk County Attorney John Sarcone violated his constitutional right to a fair trial by failing to perform a background check on James Ramey before hiring Ramey as an Assistant County Attorney. The plaintiff alleges in Count 1 that

the county's policy or custom of not performing background checks on prospective employees, and in particular its negligent hiring of Ramey, violated plaintiff's constitutional right to a fair trial. Plaintiff relies on *Monell v. Department of Social Services*, 436 U.S. 658 (1978), although that case held that a municipality cannot be vicariously liable for an employee's unconstitutional act that deviates from the municipality's policy or custom. *Id.* at 690-91.

The Court of Appeals for the Eighth Circuit has held that county employees' unconstitutional acts constitute a policy or custom only where county officials are directly responsible for the unconstitutional acts of subordinates or are deliberately indifferent to their illegal conduct. *See, e.g., Harris v. City of Pagsdale*, 821 F.2d 499, 504 (8th Cir. 1987). If the allegedly illegal acts were not done at the express direction of county officials, the plaintiff must prove that county officials tacitly authorized the illegal acts by failing to take remedial steps after having knowledge of a pattern of illegal conduct by subordinates. *Id.* (citing *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986)).

Under this standard, plaintiff's claim must fail. He has not shown that Sarcone, simply by hiring Ramey, was directly responsible for Ramey's allegedly unconstitutional acts, which are separately alleged in Count 7. Nor has plaintiff shown that Sarcone was aware of a pattern of unconstitutional conduct and failed to remedy that conduct. In sum, Sarcone's conduct is not sufficiently related to Ramey's conduct to impose § 1983 liability on Polk County.

Defendant Polk County is entitled to summary judgment on Count 1 of the complaint.

B. Section 1983 Claim Against Ramey.

Plaintiff Ronald White has alleged in Count 7 that defendant James Ramey is liable under 42 U.S.C. § 1983 because he denied White his constitutional right to a fair trial. Specifically, White alleges Ramey gave police officers unreasonable legal advice, filed charges against White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during the prosecution of White.

Ramey contends he is absolutely immune from plaintiff's allegations. Plaintiffs, on the other hand, contend Ramey is not entitled to absolute immunity because his actions were outside the ambit of his prosecutorial duties. This case is controlled by *Imbler v. Pachtman*, 424 U.S. 409 (1976), which held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. Thus, Ramey plainly has absolute immunity from a § 1983 action alleging that he filed charges against White without adequate investigation, suppressed exculpatory evidence, and made false statements to the court during the prosecution of White. *See id.* at 424.

Ramey also has absolute immunity from plaintiff's allegation, contained in paragraph 3 of count 7, that Ramey "gave police officers unreasonable legal advice." White does not claim that Ramey's "advice" led to any action by the police that violated his constitutional rights.

Rather, plaintiff has alleged that Ramey advised Officer Foster to keep evidence that, if introduced at trial by Ramey, would have exculpated White. Contrary to the language of the complaint, Ramey's statement was not "advice" at all. The allegation concerns Ramey's "role as advocate for the State," which may include "actions preliminary to the initiation of a prosecution and actions apart from the courtroom," *id.* at 431 n.33; the allegation does not concern "the role of an administrator or investigative officer." *Id.* at 430-31. This situation differs fundamentally from *Burns v. Reed*, 111 S.Ct. 1934 (1991), where a prosecutor was denied absolute immunity for advising police officers to hypnotize a criminal suspect in order to question her. *Id.* at 1937. Thus, Ramey has absolute immunity for all his actions that allegedly created liability under section 1983.

Defendant Ramey is entitled to summary judgment in his favor on Count 7 of the complaint.

C. Intentional Infliction of Emotional Distress.

Plaintiff Ronald White has alleged in Count 5, and plaintiff Jodi White has alleged in Count 6, that the defendants are liable to each of them for intentional infliction of emotional distress. Defendants have moved for summary judgment on this claim; plaintiffs have not responded to this portion of the motion.

To succeed on an intentional infliction of emotional distress claim, the plaintiffs must prove that (1) the defendants' conduct was outrageous; (2) the defendants intentionally caused, or had reckless disregard for the

probability of causing, emotional distress; (3) the plaintiffs suffered severe or extreme emotional distress; and (4) the defendants' outrageous conduct actually and proximately caused plaintiffs' emotional distress. *See Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984); *see also Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992).

The record before the court, even when viewed in a manner most favorable to the plaintiffs, fails to establish liability on this claim for either defendant. Neither Polk County's hiring of Ramey nor Ramey's conduct was "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Harsha v. State Savings Bank*, 346 N.W.2d 791, 801 (Iowa 1984) (quoting *Restatement (Second) of Torts* § 46, cmt. d (1965)).

Thus, defendants Polk County and James Ramey are entitled to summary judgment on Counts 5 and 6.

IV. Conclusion.

Plaintiffs' motion for partial summery [sic] judgment is denied. Defendants Polk County and James Ramey's motion for summary judgment is granted on Counts 1, 7, and those parts of Counts 5 and 6 that assert claims against them. Remaining in this case are Counts 2, 3, 4, and those parts of Counts 5 and 6 that assert claims against the City of Des Moines, William Moulder, Ronald Foster, and David Noel.

IT IS SO ORDERED.

Dated this 21 day of July, 1992.

/s/
CHARLES R. WOLLE,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT